IN THE COURT OF APPEALS OF IOWA

No. 2-235 / 91-1376

FILED
AUG 27 1992
CLERK SUPREME COURT

MARIE D. REDENIUS,

Appellant,

vs.

MARVIN H. REDENIUS ESTATE, BRYAN REDENIUS and **ROXENE REDENIUS,** Co-Executors of MARVIN H. REDENIUS ESTATE, Grundy County, Iowa, Probate No. Y-88,

Appellees.

Appeal from the Iowa District Court for Grundy County, Peter Van Metre, Judge.

Marie Redenius appeals from a district court order denying her petition for declaratory judgment concerning the construction of her antenuptial agreement with her now deceased spouse, Marvin. **AFFIRMED.**

G.A. Cady III of Hobson, Cady & Cady, Hampton, for appellant.

Gary Papenheim, Parkersburg, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

Marie Cornelius and Marvin Redenius were married in 1970. Both parties had been widowed from a previous marriage. Prior to their marriage, the parties signed an antenuptial agreement, prepared by attorney John Behnke. The agreement provided, in part, that each spouse would maintain the separate control and ownership of his or her "property." At the time of the marriage, Marvin farmed his parents' land and owned some farm machinery. Marie had an interest in a portion of a farm she owned at the death of her first husband.

In 1975, Marvin's mother died and Marvin acquired his parents' farm subject to a life estate in his father. In 1979, both Marvin and Marie executed wills. The parties used the same attorney, Mr. Behnke, who had executed their antenuptial agreement.

In September 1987, Marvin died. Following the admission of the will into probate, Marie filed an application for construction of the will. The district court construed the will, in general, to provide that most of Marvin's property would go to his children and not to Marie. This was affirmed on appeal. In re Estate of Redenius, 425 N.W.2d 295 (Iowa App. 1990).

In July 1990, Marie filed this petition for declaratory judgment. Marie sought a determination that the antenuptial agreement should be set aside as a product of fraud to the extent it prevented her from receiving an

undivided one-half share in farm-related personal property acquired by the parties after the marriage. Following trial, Marie filed an amendment to her petition to conform to the proof. This amendment was granted over defendants' objection. The amendment sought to reform the antenuptial agreement to permit her to receive a share of the personal property and also sought a determination that the agreement did not apply to certain after-acquired property.

The district court rejected Marie's petition in its entirety. It concluded the agreement clearly provided the parties' separate property, whenever acquired, remained separate and free from the claims of the other.

Marie has filed this appeal. In this equity action, our review is de novo. Iowa R. App. P. 4.

> Our courts have repeatedly recognized that while in cases of equity the reviewing court is not bound by the fact findings of the trial court, factual disputes which depend heavily on the credibility of witnesses are best resolved by the trial court which has a better opportunity to evaluate credibility than we do.

Maisel v. Gelhaus, 416 N.W.2d 81, 86 (Iowa App. 1987). On our review, we affirm the district court.

Marie contends the district court erred in (1) failing to determine the antenuptial agreement should be reformed due to a mutual mistake in its integration; and (2) failing to award her an undivided one-half interest in certain after-acquired property.

I. **Mutual Mistake in the Integration of the Antenuptial Agreement.** Marie argues the antenuptial

agreement she and Marvin signed in 1970 was not intended to cover property acquired after the marriage, with the exception of Marvin's anticipated inheritance of the Redenius farm. As the agreement signed by Marie and Marvin does not reflect this alleged intent of the parties, Marie asserts a mutual mistake occurred and requests the court to reform the contract accordingly.

Under Iowa law, an antenuptial contract is controlled by the same rules as other contracts, and if it is fair on its face and free from fraud, it will be enforced. In re Parish's Estate, 236 Iowa 822, 832, 20 N.W.2d 32, 37 (1945). A contract may be avoided "where the party seeking to avoid the contract establishes that both parties were mistaken about an essential fact that was a material consideration for the contract." Pathology Consultants v. Graton, 343 N.W.2d 428, 437 (Iowa 1984). "To be mutual, a mistake must exist at the time of the contract and must be common to both parties." Krieger v. Iowa Dep't of Human Servs., 439 N.W.2d 200, 203 (Iowa 1989).

The antenuptial agreement provided, in part: "Each shall have, hold and maintain his or her separate control, ownership, and disposition of the property, owned by each, and the avails thereof, the same thereafter as if said marriage had not occurred . . . ." No distinction is made between property acquired before and after the marriage. In order for Marie to establish a mistake in integration occurred, she must prove both she and Marvin were mistaken

about the meaning of the above language and had intended any property acquired after the marriage to not be subject to this agreement.

The only proof Marie offers to establish that both she and Marvin were mistaken about the meaning of the agreement is her own testimony. We find her testimony has only minimal evidentiary value. We agree with the findings of the district court, that:

> Her testimony is suspect, especially her statement that she had no previous contact with Attorney Behnke until the signing of the antenuptial agreement. The record overwhelmingly shows extensive dealings with Attorney Behnke, including his handling of the probate of her first husband's estate.

In addition, Marie's testimony regarding her familiarity with the antenuptial agreement, at the time she and Marvin signed it, is strikingly contradictory. At the will construction hearing, Marie's testimony was as follows:

> Q: (Papenheim) Okay. Now, did you read the document before you signed or entered it? A: (Marie) Pardon?
> Q: Do you recall whether you went through the document with attorney -- A: Yes, we did.
> Q: And you -- after you went through the document with attorney Behnke you signed the document; is that correct? A: That's right.

However, at the trial for the declaratory judgment action, Marie's testimony was:

> Q: (Papenheim) Are you telling the court now that you never sat down somewhere with Marvin and discussed or -- before signing that document outside of John Behnke's office that he wanted an Antenuptial Contract? A: (Marie) No.

> Q: When you got to Mr. Behnke's office and you were presented with the Antenuptial Agreement, did you actually read the document? A: No I didn't.
>
> Q: You did not go over the document in any way with John E. Behnke; is that correct? A: No, we didn't.

Furthermore, in January 1979, Marie and Marvin executed wills prepared by Mr. Behnke, which were completely in accord with the antenuptial agreement.[1] It is clear from these wills that Marvin and Marie intended the Cornelius property, income, and assets to be Marie's separate property and to go to her children, and the Redenius property should be Marvin's property and go to his children. If there had been a mutual mistake on Marvin's and her part regarding property acquired after the marriage, surely Marvin would have left more to Marie in his will.

Not only does the evidence suggest Marvin was not mistaken about the terms of the antenuptial agreement, but the evidence also suggests Marie was not mistaken about whether the antenuptial agreement covered property acquired after the marriage. We do not find a mutual mistake occurred in the integration of the antenuptial agreement.

II. Reformation of the Antenuptial Agreement. Marie next argues, due to the mutual mistake, the contract should

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1. In In re Estate of Redenius, 455 N.W.2d 295, 299 (Iowa App. 1990), the Iowa Court of Appeals held Article V of Marvin's will was repugnant to the scheme of distribution and was properly struck from the will.

be reformed to not apply to property acquired after the marriage. Because we do not find a mutual mistake occurred, we find the district court did not err by failing to determine a reformation was necessary.

III. Marie's Right to an Undivided One-Half Interest in Post-Marital Acquired Machinery and Crops. Marie also argues the trial court erred in determining the machinery and crops were owned entirely by the decedent and thus, through its interpretation of the antenuptial agreement, the court erred in not granting Marie any right to those items. Specifically, she argues she owns an undivided half-interest because the money used to purchase Marvin's property passed through a checking account owned in joint tenancy.

District court Judge Van Metre, in his order, made no specific findings on the ownership of this property purchased with monies which passed through the joint checking account. He made no findings on whether a tenancy-in-common was created through this joint checking account. No rule 179(b) motion as ever filed. This issue could be adequately preserved only by a rule 179(b) motion.

> It is well settled that a rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. . . . Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and decided upon appeal.

State Farm Mut. Auto. Ins. Co. v. Pflibsen, 350 N.W.2d 202, 206-07 (Iowa 1984) (citations omitted).

If no rule 179(b) motion is made, or an issue not raised, we will assume as fact an unstated finding necessary to support the trial court's judgment. Hubby v. State, 331 N.W.2d 690, 695 (Iowa 1983). Any ambiguity in the trial court's findings is decided in favor of the judgment. Id.

Marvin had no other checking account with which to pay his separate farm expenses. The evidence suggests these purchases were for Marvin's farming operation alone. We find this property, although purchased with funds from the joint account, was still in Marvin's ownership. Given the language of the antenuptial agreement, as construed by us and by the district court, the property purchased with money which passed through the joint account was still subject to the antenuptial agreement.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit.

For all the reasons stated, the judgment of the district court is affirmed. Costs shall be charged to the appellant.

AFFIRMED.